At the Jerusalem District Court **AP**
Sitting as the Court for Administrative Affairs

In the matter of:

1. **_____ Ghanem, ID No. _____**
2. **_____ Ghanem, born June 16, 1996 (no status)**
3. **_____ Ghanem, born November 25, 1998 (no status)**
4. **_____ Ghanem, born November 20, 2000 (no status)**
5. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

all represented by counsel, Benjamin Agsteribbe (Lic. No. 58088) and/or Noa Diamond (Lic. No. 54665) and/or Adv. Sigi Ben Ari (Lic. No. 37566) and/or Abir Joubran-Dakwar (Lic. No. 44346) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Bilal Sbeihat (Lic. No. 49838) and/or Tal Shneider (Lic. No. 62448)

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The Petitioners

v.

Population Immigration and Border Authority

The Respondent

Administrative Petition

The Honorable Court is hereby moved to strike down the decision of the Respondent not to register Petitioners 2-4, the children and grandchildren of permanent residents of Israel, in the population registry,

and instruct it to grant them a permit for permanent residency in Israel under Regulation 12 of the **Entry into Israel Regulations**, 5734-1974 (hereinafter: **Regulation 12**).

Prior to proceeding with the petition, the Petitioners hereby move that the petition be heard in open court.

Introduction

The petition herein is filed with the Court with respect to the Respondent's refusal to register three children born to a permanent resident of Israel in the Israeli population registry. The children, who were born in Jerusalem and have lived in the city continuously since birth, are raised by their grandmother, who was appointed their legal guardian by the Jerusalem Shari'a court. Guardianship was awarded after the children's father was sentenced to a lengthy prison term and their mother abandoned them when she returned to live in the West Bank following her husband's incarceration. As the children were effectively abandoned by both their biological parents, their grandmother requested the Respondent grant her request to have her grandchildren registered in the population registry with the same status as her own, permanent residency in Israel, under Regulation 12.

As stated, the Respondent refuses to grant the children's grandmother's request as it contends that the rationale for Regulation 12 does not conform to the rationale for the guardianship application. As such, the Respondent maintains that the Shari'a Court order that awarded guardianship of the children to their grandmother does not give rise to a duty on its part to register Petitioners 2-4 pursuant to Regulation 12.

We note at this early stage, that the Respondent, which refuses to comply with the conclusive guardianship order given in the children's matter, never bothered to challenge before the appropriate judicial instances, nor has it ever bothered to professionally assess what would be in the best interest of the children who have been abandoned by their biological parents. Instead, the Respondent elected to leave the three wretched soles with no status anywhere in the world, relying on a judgment recently issued by this Court. However, as elucidated herein, the judgment on which the Respondent relies addressed different circumstances than those herein and therefore has no bearing on the matter at hand.

The deep disrespected expressed by the Respondent's decision for the orders issued by the Shari'a Court, an arm of the judiciary, is all the more grievous considering that in the matter of the Petitioners, it involves a severe violation of human rights and the children's true best interest. Hence the petition at bar.

The parties

1. **Petitioner 1** (hereinafter: **the Petitioner**) is a permanent resident living in Jerusalem and the grandmother of Petitioners 2-4. The Petitioner has been raising Petitioners 2-4, along with her spouse, also a permanent resident, since she was awarded guardianship over them by order of the Shari'a Court and has also been recognized as their foster mother.

2. **Petitioners 2-4** are the children of a permanent resident of Israel and the grandchildren of the Petitioner. They were born in Israel and have lived there their entire lives. Petitioners 2-4 have no status anywhere in the world.

3. **Petitioner 5** is a human rights organization whose goal is, among others, to assist residents of East Jerusalem who are victims of abuse or discrimination at the hands of state authorities, including defending their status and rights in East Jerusalem through litigation, whether on its own behalf as a public petitioner or as counsel to individual victims of rights abuses. In this context, Petitioner 5 assists East Jerusalem residents whose status has been revoked; residents who make family unification applications for their spouses and children; residents who apply to have their children registered and stateless individuals living in East Jerusalem.

4. **The Respondent** is the Population Immigration and Border Authority (hereinafter: the Respondent, or PIBA), which has been delegated some of the powers of the Minister of Interior, *inter alia*, with respect to processing and approving applications for grant of status to children filed by permanent residents of Israel living in East Jerusalem.

The matter of the Petitioners

5. The Petitioner, who, as stated, is a permanent resident of Israel, has lived in the country ever since her marriage to her spouse, Mr. _____ Ghanem, also a permanent resident. The couple live in Kafr ʻAqab, in a home that belongs to the family.

6. The Petitioner and her husband have nine children, including _____ (ID No. **_____**) (hereinafter: **the father**).

7. The father married twice. His son **_____** was born of his first marriage in 1994. He is a permanent resident. After he divorced **_____**'s mother (who immigrated to the USA), the father married **_____**, a resident of the Occupied Palestinian Territories (OPT). **_____** is the mother of **_____**, **_____** and **_____**, Petitioners 2-4 (hereinafter: **the children**, **the grandchildren**, or **Petitioners 2-4**).

   Copies of the children's birth certificate are attached hereto and marked **P/1**.

8. In 2001, the father was incarcerated. He is serving nine life sentences.

   Confirmation of the father's incarceration issued by the ICRC is attached hereto and marked **P/2**.

9. In 2005, the Petitioner was awarded full guardianship of the children by the Jerusalem Shari'a Court. During the guardianship proceedings, the mother, **_____**, gave up custody of her children.

   The guardianship order issued by the Shari'a Court and its unofficial translation by HaMoked staff member Ms. Denise Haddad, who is fluent in both Arabic and Hebrew, is attached hereto and marked **P/3**.

10. We note at this early point, that although the children's parents divorced, via power of attorney, only on February 23, 2011, their mother severed all contact with them some ten years ago.

    The divorce papers issued by the Shari'a Court are attached hereto and marked **P/4**.

The applications to have the children registered

11. After receiving guardianship over the children, the Petitioner contacted the Ministry of Interior in an attempt to secure status in Israel for her grandchildren, including with the assistance of St. Yves. These attempts have not been successful.

12. On January 12, 2011, Petitioner 5, on behalf of the Petitioner, submitted a new application for child registration to the population registry East Jerusalem bureau (hereinafter: **the East Jerusalem bureau**, or **the bureau**). The application enclosed current center-of-life documents.

    The application to the East Jerusalem bureau dated January 12, 2011, which was assigned the number 284/11 is attached hereto and marked **P/5**.

13. On February 23, 2011, the Petitioners received a letter from the East Jerusalem bureau dated February 22, 2011. The Petitioners were instructed to provide the bureau with current house bills

for the Petitioner's dwelling for the year 2011 and her grandchildren's 2011 report cards. The bureau also asked a number of questions regarding the Petitioner's source of income and questions about the children's mother. Finally, the bureau asked for a welfare services report relating to "the best interest of the children, considering the guardianship order issued by the Shari'a Court did not address this issue".

The letter of the East Jerusalem bureau dated February 22, 2011 is attached hereto and marked **P/6**.

14. On May 19, 2011, the Petitioner produced the documents requested by the bureau in its February 22, 2011 letter, with the exception of the welfare services report, which was delayed as a result of the social workers' strike.

The cover letter sent with the documents on May 19, 2011, is attached hereto and marked **P/7**.

15. On June 23, 2011, the report of Mr. Jacques Theodory, a social worker from the City of Jerusalem Welfare Department (Shu'fat Bureau), was added to the application.

According to the report, the children's mother had abandoned them and returned to her family in the OPT, as her family did not wish for their daughter to maintain a relationship with a prisoner serving a life sentence. The report describes the Petitioner as a most important and significant person in the children's lives. She is reported to have a positive relationship with the children and as the person who cares for the children's physical, social and emotional needs.

The letter of Petitioner 5 dated June 23, 2011 and the social services report enclosed therewith is attached hereto and marked **P/8**.

Application for Further Review 100/12

16. The response of the bureau was slow to arrive, despite repeated reminders. Given the long wait for the bureau's response to the child registration application, on February 1, 2012, the Petitioner made an application to the Respondent's Appellate Committee for Foreigners. In the application, the Petitioners expressed their discontent with the processing of the children's matter, which was extremely protracted.

The application to the appellate committee which was assigned the number 100/12, excluding enclosures, is attached hereto and marked **P/9**.

17. On February 5, 2012, a representative of the Respondent's legal department asked the Chair of the Appellate Committee for Foreigners to expunge the application from the record, given that the bureau had allegedly issued its decision on January 19, 2012. The bureau representative contended that the application must be expunged given its decision and that the Petitioners may file an application for further review of this decision by the Appellate Committee for Foreigners within 30 days of receipt of the bureau's decision. Note, the bureau's decision was not provided to the Petitioners prior to submission of the request to have the application expunged.

The request to expunge the application, enclosing the refusal issued by the East Jerusalem bureau, as first provided to the Petitioners at the time the request to expunge the application, dated February 5, 2012 is attached hereto and marked **P/10**.

18. In its refusal letter, the bureau made the following assertion:

> Neither the custody order nor the welfare services report included any arguments, or presented any evidence that unequivocally demonstrate that the children's biological mother is unable to care for them due to physical and/or physiological [sic] incapacity. It is important to note that the applications the grandmother submitted for grant of status to her grandchildren in April 2006 and December 2011, were refused on the same grounds.

19. Given this development, and despite the fact that the refusal was not provided to the Petitioners prior to the request to have application 100/12 expunged, the Petitioners had no choice but to consent to the expungement of the application. They gave their consent on February 8, 2012.

    The Petitioners' consent to the expungement of the first application to the appellate committee is attached hereto and marked **P/11**.

Application for Further Review 170/12

20. On March 1, 2012, the Petitioners filed another application to the Appellate Committee for Foreigners. The application for further review of the Respondent's refusal to grant status to the children (hereinafter the application for further review), was assigned the number 170/12. In their application for further review, the Petitioners argued that the refusal was wrongful. The Petitioners contended, *inter alia*, that the bureau's decision blatantly ignored a firm and valid guardianship order issued in 2005 by a court that is recognized by the State of Israel, as well as a report by the welfare services stating that the children had been abandoned by their mother. Moreover, in its refusal decision, the bureau undermined the very values Regulation 12 was meant to protect. Given all this, the Petitioners asked the committee to instruct the bureau to overturn its decision and register the children in the population registry forthwith, as required by law.

    A copy of application for further review, dated March 1, 2012, excluding enclosures, is attached hereto and marked **P/12**.

21. On March 5, 2012, the Committee Chair transferred the application for further review to the Respondent named therein, the PIBA legal department (hereinafter: **the legal department**), for response.

    A copy of the aforementioned decision is attached hereto and marked **P/13**.

22. The Petitioners awaited the legal department's response for more than 15 months. The conduct of both the appellate committee and the Respondent's legal department, which included repeated extensions, blatant disregard for the committee's working protocols and deep disrespect for individuals who seek the services of the committee was detailed in paragraphs 31-54 of AP 26225-05-13 **Ghanem v. Ministry of Interior**, attached hereto and marked **P/14**.

AP 26225-05-13

23. Given the contemptuous conduct exhibited by the committee and by the Respondent's legal department in handling the application for further review, the Petitioners were left with no other choice but to seek remedy from this Honorable Court. They filed an administrative petition, AP 26225-05-13 on May 13, 2013, seeking the Court to instruct the Ministry of Interior to **make a decision** in the Petitioners' child registration application.

    In their petition, the Petitioners argued that the Appellate Committee for Foreigners and the legal department are, in fact, two arms of the Respondent herein. As such, given that the committee repeatedly granted the legal department extensions, without justification,

and refrained from exercising its authority to make a decision in the application for further review, the appeal process had been completely exhausted.

A copy of AP 26225-05-13, excluding exhibits is attached hereto and marked **P/14**.

24. On June 30, 2013, the Petitioners received a notice from the Respondents in the petition indicating that a response to the application for further review had been submitted on June 25, 2013. The response was attached to the Respondent's notice in the petition. In a nutshell, the response stated that the decision to refuse the registration application had been professional, appropriate, proportionate and reasonable and that it met the principle of good governance.

25. A copy of the Respondent's notice in AP 26225-05-13, including the response to the application for further review attached thereto is attached hereto and marked **P/15**.

26. On that day, the Petitioners submitted their response to the Court, requesting that the Court review the petition on its merits. The Petitioners stated that they had exhausted the available remedies as required of them, given that the Appellate Committee for Foreigners had not made a decision in the application for quite some time, despite having power to do so.

A copy of the Petitioners' Response dated June 30, 3013 is attached hereto and marked **P/16**.

27. On July 9, 2013, the judgment dismissing the petition was issued. It stated the following:

> In the entire time that has elapsed, including prior to the submission of the application for further review, there has been no resolution for the issue of the status of Petitioners 2-4 (who are minors). This does raise some difficulty, if only with respect to the great delay in the decision of the administrative authority… Subsequent to submission of the petition, Respondent 2 submitted its response to the Appellate Committee for Foreigners. **Presumably, in the current state of affairs, considering the overall circumstances of the matter, the Appellate Committee for Foreigners will reach a decision relatively soon**. Given the overall circumstances, there is no need to review the petition on its merits, and the Appellate Committee for Foreigners must be allowed to make a final decision in the application for further review, without prejudice as to the Petitioners' right to bring their case before this Court after receiving the decision or inasmuch as the decision is not made within a reasonable time after the delivery of this judgment.
>
> (AP 26225-05-13, judgment, emphasis added, B.A.)

The judgment dated July 9, 2013 is attached hereto and marked **P/17**.

28. On July 14, 2013, the Petitioners filed a motion for a costs order in their favor.

The motion for a costs order is attached hereto and marked **P/18**.

29. On September 11, 2013, the Court awarded a 5,000 ILS costs order in favor of the Petitioners.

The costs order is attached hereto and marked **P/19**.

Resumption of application for further review 170/12

30. On July 16, 2013, the Petitioners filed their response to the Statement of Response provided to the application for further review.

    Response to Statement of Response to the application for further review is attached hereto and marked **P/20**.

31. On July 17, 2013, the response was provided to counsel for the legal department for response within 21 days.

    The decision of the committee dated July 7, 2013 (handwritten on Petitioners' response) is attached hereto and marked **P/21**.

32. On October 16, 2013, the Petitioners demanded a decision on the application for further review.

    Petitioners' notice in the application for further review dated October 16, 2013 is attached hereto and marked **P/22**.

33. On October 17, 2013, the Committee Chair's decision of the same day was received, indicating that "there have been delays in decisions by the committee. The committee will issue a decision soon".

AP 36065-04-14

34. On April 24, 2014, given no decision had been made with respect to the application for further review, the Petitioners were compelled to file another petition with the Honorable Court, challenging the conduct of the committee, which breached Respondent's protocols.

    A copy of AP 36065-04-14, without enclosures, is attached hereto and marked **P/23**.

35. Following submission of the application, the Respondent's committee gave its decision on April 30, 2014, wherein it refused the application for the registration of the Petitioners in the population registry – the impugned decision herein. Following issuance of the decision, the Petitioners filed a motion to have the petition withdrawn, court fees reimbursed and a costs order. The judgment ordering the withdrawal of the petition was rendered the next day.

    A copy of Respondent's decision as supplied to the Petitioners on May 1, 2014 is attached hereto and marked **P/24**.

Decision in Application for Further Review 170/12

36. In its decision, the Respondent's Appellate Committee determined that the guardianship order issued by the Shari'a Court appointing Petitioner 1 as guardian of her grandchildren, Petitioners 2-4, is a judicial decree for all intents and purposes. Therefore, in section 26 of its decision, the committee determines that once a judicial instance has made its decision, an administrative authority has no discretion to disregard the directive included in the decision. At the same time, the Respondent's committee, which is no more than an arm of the executive branch, criticizes the judicial decision of the Shari'a Court and questions its validity.

37. The committee then goes on to determine that the application for child registration must be rejected based on a ruling issued by this Honorable Court in AP 27267-01-14 **Afghani et al. v. Minister of Interior et al.** (hereinafter: **Afghani**). The committee takes the position that the matter in **Afghani** is similar to the matter of the Petitioners herein in every aspect and every element. As such, given the Respondent's position that the rationale underlying Regulation 12 is not the rationale

underlying the application for guardianship, the Shari'a Court order does not compel it to register Petitioners 2-4 under Regulation 12.

A copy of the judgment in **Afghani**, as provided to the Petitioners is attached hereto and marked **P/25**.

The Legal Framework

38. As detailed below, the Respondent's decision to deny the application made in the matter of Petitioners 2-4 is fundamentally flawed. First, the decision severely violates the basic rights of three children who have no status anywhere in the world, and their grandmother's rights. The decision also disregards a conclusive judicial order and contradicts Regulation 12 and the Respondent's own operating procedures. Second, this cruel decision was not predicated on any solid evidence or a substantive, professional assessment of the children's situation or best interest, indicating that the children's interest is other than that determined in the order. As such, it is also clear that the question of whether it is possible that the conclusive order in the matter of the children does conform to the rationale underlying Regulation 12 has never been truly considered. Finally, there is the matter of **Afghani**, on which the Respondent seeks to rely for its decision to refuse status to Petitioners 2-4 in the petition herein. As the Petitioners will show, the reference to **Afghani** is erroneous as the matter therein is completely different from the matter of the Petitioners herein. The Petitioners' position, is, therefore, that the Respondent's decision in their matter is a decision handed out at the end of a lengthy, cruel process which breached statute, case law and procedure from beginning to end. We now specify the issues in sequence.

Regulation 12 of the Entry into Israel Regulations

39. Regulation 12 of the Entry into Israel Regulations 5734-1974 (hereinafter: **Regulation 12** or **the Regulation**), issued under the Entry into Israel Law 5712-1952 sets forth:

> The status of **a child who was born in Israel**, but to whom section 4 of the Law of Return 5710-1950 does not apply, shall be the same as the status of the child's parents. Inasmuch as the parents do not share one status **the child shall receive the status of the father or of the guardian unless the other parent objects thereto in writing**. Inasmuch as the other parent objects, the child shall receive the status of one of the parents, as shall be determined by the Minister.
>
> (emphases added, B.A.)

40. The purpose of the Regulation has been determined in the ruling issued in HCJ 979/99 **Carlo v. Minister of Interior** (published in Nevo) (hereinafter: **Carlo**):

> The question of the purpose underlying Regulation 12 arises. It appears that the situation the secondary legislator envisioned and sought to prevent, was one where there is a gap or discrepancy between the **status** of a **parent who resides in Israel by virtue of the Entry into Israel Law** and the **status** of a **child who is born in Israel**, but is not entitled to legal status in the country simply by virtue of the fact that he was born there. As a rule, our **legal system recognizes and respects the value of the integrity of the family unit and of safeguarding the child's best interest**. Therefore, any gap between the **status** of a minor child and the status of the parent who has custody or **is entitled to custody**, should be avoided.
>
> (emphases added, B.A.)

41. In the judgment given in AP 5569/05 **Ministry of Interior v. 'Aweisat** (published in Nevo) (hereinafter: **'Aweisat**) the Court elaborated on the purpose of the Regulation.

> … **[T]he fact that the secondary legislator chose to make a special regulation with respect to the status of children who were born in Israel, must be borne in mind**. As we have already noted, **the provisions of the Entry into Israel Law and of the Regulations issued by virtue thereof, generally do not establish criteria for granting Israeli permanent residency visas**. Therefore, **the very fact that a special regulation was made for resolving the Israeli status of children** who were born in the country illustrates that the secondary legislator sought to determine that **special, significant weight must be given to the integrity of the family unit**, when it comes to such minors. Secondly we must take into account the special nature of Regulation 12 as a regulation that is designed to promote human rights, on two aspects. The first aspect relates to the right of the parent with Israeli status to raise his child, that is to say the constitutional right of the parent to a family life. The second aspect relates to the independent and autonomous rights of the minor to live his life alongside his parent.
>
> (Emphases added, B.A.)

42. In **'Aweisat**, the Court instructed the Respondents on how to proceed with the processing of applications that meet the terms of Regulation 12, as follows:

> [**..**] despite this broad discretion […] the Minister of Interior must **give great weight to the consideration of the integrity of the child's family** and **the child's center-of-life**.
>
> […] **Except for rare and extreme cases**, and **in the absence of any concrete criminal or security impediment, the Minister of Interior will have to grant the minor status** that is identical to that of his mother or father who has Israeli status.

43. Thus, in **'Aweisat**, the Court delimited the Respondents' discretion by stating that **so long as there are no rare and extreme impediments, the Respondent must bring the status of a child who comes under the Regulation on par with the status of the custodial parent with whom the child lives.**

44. In the judgement issued in AAA 1966/09 **'Attoun et al. v. Minister of Interior** (hereinafter: **'Attoun**), the Supreme Court reiterated that:

> This Regulation [Regulation 12, B.A.] is unique among the laws regulating the issue of granting status in Israel under Section 1(b) of the Entry into Israel Law […] **The unique nature of the Regulation is that it sets the criteria for exercising the discretion granted to the Minister of Interior. This discretion is generally broad** with respect to granting status in Israel under the Entry into Israel Law. These statutory guidelines for exercising discretion apply only to the circumstances of children to whom Regulation 12 relates.
>
> (Emphases added, B.A.)

45. Thus, the broad discretion usually enjoyed by the Respondents in decisions on grant of status in Israel under the Entry into Israel Law, is demarcated, and extremely limited, when it comes to applications for status in Israel that meet the terms of Regulation 12.

46. And still, despite the clear case law on the registration of children under Regulation 12, despite the fact that the application made by the Petitioners herein meets all the terms of said Regulation, is supported by a conclusive order issued by the Shari'a Court and a report from State of Israel welfare authorities, the Respondent made the conscious decision to leave the Petitioners without any status whatsoever. The decision on a measure that has such serious implications, i.e., the violation of both the grandmother's and the grandchildren's right to family life and harm to the children's best interest, was taken without the Respondent bothering to have the matter assessed by professionals who are able to make a substantive inquiry into the children's best interest and determine whether the parallels drawn to **Afghani**, on which the Respondent seeks to rely, are in fact worthy and appropriate.

Administrative authority questioning the validity of a judicial order

47. As stated above, Regulation 12 stipulates that any child who is born in Israel and does not come under Section 4 of the Law of Return, and whose parents do not have the same status, **will receive the status** of the father or **guardian**. Indeed, in the matter of the Petitioners, there is a conclusive guardianship order wherein the Petitioner, who cares for the children's safety, welfare, health, education and development, is named their legal guardian. However, in section 28 of its decision dated April 30, 2014, the Appellate Committee questions the validity of the order, and therefore decides to ignore it and refuse to register the children in the population registry.

The Shari'a Court competence to issue a guardianship order

48. The powers of the Shari'a Court were stipulated in the Order of the King in Council for Palestine (hereinafter: **the Order in Council**), and the Muslim Religious Court Procedure Law of 1933. Sections 51 and 52 of the Order in Council stipulate:

> Subject to the provisions of Articles 64 to 67 inclusive, Jurisdiction **In Matters Of Personal Status Shall Be Exercised In Accordance With The Provisions Of This Part By The Courts Of The Religious Communities** Established And Exercising Jurisdiction At The Date Of This Order. For The Purpose Of These Provisions Matters Of Personal Status Mean Suits Regarding Marriage Or Divorce, Alimony, Maintenance, **Guardianship**, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons.
>
> **There shall be an appeal from the Court of the Qadi to the Moslem Religious Court of Appeal whose decision shall be final**.
>
> (Emphasis added, B.A., [source for text: http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656, translator])

49. Section 69 of the **Legal Capacity and Guardianship Law** 5722-1962 stipulates:

> The Attorney-General or his representative may, if he considers that the interests of a minor, a legally incompetent person, a ward or a person in need of guardianship, or the public interest so require, institute legal proceeding,

> including appeals, under this Law, and appear and plead in any such proceedings.

Section 79 of the same law stipulates:

> This Law shall not affect any law relating to marriage and divorce; it shall neither add to nor derogate from any jurisdictional power of religious courts, where a religious court is competent by law, any provision of this law which refers to a court – except section 75 – shall be deemed to refer to a religious court.

50. Thus, all of the above, along with Regulation 12 indicates that a child who belongs to the Muslim community and is raised by the person appointed legal guardian in Israel by a recognized Shari'a court, is entitled to have his or her status brought on par with the guardian's. The above statutes, and particularly section 69 of the Legal Capacity and Guardianship Law 5722-1962, also indicate that **inasmuch as there was room to challenge the guardianship order and object thereto, which the Petitioners dispute, the Respondent should have taken the appropriate action, or make an appearance in a judicial proceeding in the matter, before the order became conclusive.**

51. However, as is known, the Respondent never bothered to challenge the order in the appropriate time and place, yet now refuses to act in a manner congruent with the order. In addition, in the matter of the Petitioners herein, the Respondent is entirely ignoring its own Procedure regarding Registration under a Guardianship Order, Procedure No. 2.12.0006. According to this procedure, in applications for child registration filed pursuant to a guardianship order:

> The competent official **shall act in accordance with the decision/s contained in the guardianship order**.
>
> (Emphasis added, B.A.)

Procedure No. 2.12.0006 is attached hereto and marked **P/26**.

52. Thus, Regulation 12, the Procedure regarding Registration under a Guardianship Order and the fact that the order is a conclusive order which was never impugned before the competent judicial instances, **leave the Respondent no room for discretion to question the guardianship order issued by a recognized court in the State of Israel.**

53. Beyond requirement, we note that this is all the more so given the report of the welfare authorities which clarifies that **the parents of Petitioners 2-4 have for many years refrained from fulfilling their obligations toward the children and the Respondents have not a shred of evidence to refute** that the children's best interest is to remain with their grandmother, who has been raising them for nearly a decade, as required by the rationale underlying Regulation 12.

Assessing the child's best interest lies outside the Respondent's purview

54. Moreover, a review of the Respondent's decision reveals that in addition to taking liberty to cast doubt about a conclusive order issued by the judicial authority, it has also taken the liberty to preside as the welfare services and claim that there is no evidence that the mother is incapable of taking care of the children. This unprofessional analysis by the Respondent, who has no tools to assess a child's best interest, has led it to the erroneous conclusion that the rationale underlying the guardianship order which transferred guardianship to the grandmother is different from the rationale underlying Regulation 12 and that as such, it has no obligation to register the children in

the population registry. It is stressed that during the Supreme Court proceeding in AAA 8569/02 **Garim Burnaa v. Minister of Interior**, the Ministry of Interior admitted that its staff does not have the required professional tools for assessing the child's best interest:

> The concept of the child's best interest is a complex concept that originates in family law. Assessing the child's best interest requires an individual examination of concrete circumstances. Such examinations are normally carried out by the courts, which have the required tools for conducting a professional, reliable examination while safeguarding the interests of all parties concerned and preventing harm to them and to their privacy […]
>
> **It is very doubtful that Ministry of Interior staff have the skills and capabilities required for conducting the individual, intimate examination necessary for assessing the minor's best interest and making a conclusive decision on the child's interest in a specific case… Can a Ministry of Interior staff member who has to make a specific decision based on considerations relating to the specific child's best interested be expected to know how to address this type of document and make an educated decision on the child's best interest?**
>
> (Section 47 of the Respondent's Final Brief, dated February 24, 2003, AAA 8569/02 **Garim Burnaa v. Minister of Interior**).
>
> (Emphasis added, B.A.)

55. Thus, according to the statements made by the Ministry of Interior in Burnaa, its staff members, including the Respondent and its various arms, lack any of the professional knowledge and understanding required to assess and determine the child's best interest. Therefore, the Respondent's assertion that the rationale underlying the order issued in the matter of the Petitioners is not the same as the rationale underlying Regulation 12 and does not seek to protect the child's best interest is **an ultra vires assertion made by an authority that is not charged with the child's best interest and has no competency to make such determinations.**

56. Moreover, in AP 700/06 **Rabiha Da'na v. Population Administration Bureau Director** (hereinafter: **Da'na**), which concerned the application of the Regulation and the issue of bringing the status of a child born in Israel on par with the status of his or her guardian, the court explicitly ruled:

> **Regulation 12 shall be applied in cases in which the minor is in the custody of a guardian with attention to the main purpose of the law, the regulations and the fundamental principles of protecting the family unit, as well as subject to the supreme principle of the need to safeguard the "child's best interest"**. Therefore, in the exceptional cases in which it is proven that the "child's best interest" is to remain in the custody of a guardian – **whether due to parental incapacity <u>or other circumstances in which the parents refrain from fulfilling their parental duties</u> –** the Respondent must follow the provisions of Regulation 12 and its purpose and register the child with the guardian's status.
>
> (Emphasis added B.A.)

57. Thus, in **Da'na**, the court found that in addition to parental incapacity, sometimes the child's best interest is to be in the care of a guardian **for reasons other than parental incapacity**. In the matter

of the Petitioners herein, however, the Respondent ignored this section of the **Da'na** judgment and rendered a decision that critically violates the fundamental rights of a grandmother and of her children, whom it leaves without status anywhere in the world; all while ignoring a conclusive court order and the position of the welfare authorities, without involving any professionals to assess whether or not in this case, the child's best interest is to remain with the grandmother because the parents refrain from fulfilling their parental duties without reasonable cause. It is therefore clear that in refusing to register Petitioners 2-4 in the population registry, the Respondent, which lacks the necessary tools to determine whether or not this case is one of those the court envisioned in **Da'na**, acted wrongfully and unacceptably.

Afghani: The Facts

58. In section 32 of the Respondent's decision impugned herein, the committee refers to the **Afghani** judgment, in which the court rejected an application in a case the Respondent believes is similar to the application made by the Petitioners herein in all elements and aspects. However, as we show below, an examination of that case demonstrates that aside from the fact that both were applications made by an Israeli resident to register grandchildren, the two cases are significantly different. We elaborate.

59. In **Afghani**, the court considered the matter of a petitioner who was born to a family in which the father and the elder sister were permanent residents of Israel, while the mother was a resident of the West Bank. After the father was killed in a car accident in late 2002, on September 29, 2003, an application was made to have the petitioner registered in the population registry granted the status to the petitioner's mother, as the natural guardian of her two daughters and their provider. On August 31, 2004, the Ministry of Interior rejected the applications made for the daughter and the mother, based on the fact that the father had passed away. The mother petitioned the court, AP 909/04. On December 20, 2014, the court issued an order on consent to bring the matter to the inter-ministerial committee. The committee reviewed the mother's matter on May 14, 2006, and made a recommendation to the executive director of PIBA to reject the application. The mother quickly filed another petition, AP 118/06, before an official decision was made. The judgment in the second petition was issued on October 29, 2006, rejecting the mother's request. As for the daughter, the petitioner in **Afghani**, the petition was dismissed with an option to file a new application on her behalf to the inter-ministerial committee.

60. However, though the court left an opening for filing a new application to the inter-ministerial committee with respect to the daughter, no such application was filed subsequent to the issuance of the judgment in AP 118/06.

61. In 2012, the petitioner's grandfather presented PIBA with a Shari'a court order, backed by recommendations from welfare professionals, and asked to have his granddaughter, the daughter of his son, registered with the same status as his under Regulation 12. PIBA rejected the request stating that it had not been provided with evidence attesting to the mother's inability to care for her daughter. In addition, the refusal decision stressed that the application to have the child registered made no reference to the elder sister, who is an Israeli resident, to where she is and in whose custody. When an application for further review was also rejected, in 2013, the petition was filed, AP 27267-01-14.

Afghani – the judgment

62. In the judgment issued on April 2, 2014, the court dismissed the petition. The judgment opens with the finding that, even if the court disregarded the fact that the grandfather delayed the application to have his granddaughter registered for five years and the grandfather's bad faith, on the face of it,

the grandfather's appointment as guardian did not constitute cause to have his granddaughter registered with the same status as him in the population registry under Regulation 12.

63. As established in case law, the purpose of Regulation 12 is to allow a child to live with his or her parents and to prevent a separation between child and parents. As such, when the two parents do not have the same status but share a center-of-life, the child will receive status that is in keeping with the family's center-of-life. However, when the parents do not share a center-of-life, the child's status is determined according to the status of the parent who has custody. Therefore, the court ruled that since the child's father had passed away and since the mother, who is mentally and physically healthy, has status in the OPT and not in Israel, the child should follow her to the West Bank.

64. The court went on to rule that in the absence of countering evidence, the Ministry of Interior has the right to assume that a child is in the custody of the parents, shares a center-of-life with one of them, and the child's best interest is not to be separated from the parent. Therefore, registration of children who lack status in Israel with the same status as an appointed guardian pursuant to Regulation 12 will be an exception, employed only in rare cases in which the child's best interest is to be in the custody of the guardian due to parental dysfunction or other, similar, reasons.

65. In **Afghani**, the court ruled that there appeared to be no objective reason to have the grandfather appointed guardian other than using his status in Israel to obtain status for the granddaughter.

Afghani: the difference

66. Thus, many of the reasons for the dismissal of the **Afghani** petition are not present in the application of the petitioners herein, making the comparison to the **Afghani** case irrelevant. We elaborate. As stated in the judgment therein, particularly in section 4 thereof, the application on behalf of the petitioner was made in bad faith. There was no clarification as to where the petitioner's sister lives or where the petitioner's mother lives. There was no explanation as to why the judgment issued in AP 118/06 had not been respected and why an application for status for the petitioner on humanitarian grounds was not filed six years earlier. In addition, in the **Afghani** case, the accounts provided by the applicants, made a complete about face. Until 2006, the mother said that she would not give up her daughters. In 2011, without any supporting evidence, the child's grandfather announced that she had been transferred to his custody.

67. In contrast, with respect to petitioners 2-4, the accounts given by the petitioners have not changed at all, and there certainly was no about face, as had been alleged in **Afghani**. The Respondent is well aware of the fact that in 2005, the year the mother abandoned her children, and custody was transferred over to their grandmother, the mother returned to the West Bank and severed all ties with her children. The Petitioners herein have, therefore, been abandoned by their parents, and have consequently remained without status anywhere in the world. They have lived with their grandmother for about a decade, without any contact or communication with their biological mother who abandoned them in 2005. As such, they have been raised at their grandmother's house in Jerusalem. As such, the Petitioners maintain that the Petitioners' matter falls within the exception the court described in **Afghani** and in **D'ana**, wherein parents abandon their children for unknown reasons, an exception that compels the Respondent to uphold the purpose of Regulation 12 which requires Petitioners 2-4 be registered with the same status as their grandmother, who is raising them.

Respondent's refusal to register the petitioners: a violation of the right to family life

68. As stated above, the Respondent's decision is primarily a serious violation of the fundamental right to family life of an Israeli resident and her stateless grandchildren. Both international and Israeli

law attach a great deal of importance to family and impose an obligation on the state to protect it. So, for example, article 10(1) of the International Covenant on Economic, Social and Cultural Rights, ratified by Israel on October 3, 1991, sets forth:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children

69. In HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2) 1754 (hereinafter: **Adalah**), the court ruled that the right to family life is a constitutional right in Israel, which forms part of the right to dignity. This position was broadly endorsed by eight of the 11 justices on the panel.

70. With respect to the child's right to family life, the **Adalah** panel found that this right relies on:

> […] on the independent recognition of the human rights of children. These rights are given in essence to every human being in as much as he is a human being, whether adult or minor. The child 'is a human being with rights and needs of his own' (LFA 377/05 A v. Biological Parents [21]). The child has the right to grow up in a complete and stable family unit.
> (**Adalah**, paragraph 28 of the opinion of President (emeritus) Ahraon Barak)

71. The status of the right to family life as a constitutional right has a direct impact on the possibility of impinging it and on delaying or denying a request to register a child made by a custodial parent or guardian who is a resident of the country.

72. The decision to deny the application for the registration of Petitioners 2-4, children who were clearly abandoned a decade ago, and to leave them without any status anywhere in the world, plainly constitutes a severe violation of the right of the Petitioner and her grandchildren to family life. However, the Respondent's decision seems to have been made in a perfunctory manner, based on a wrong analysis of the information, in disregard for a conclusive court order and without obtaining a professional opinion or providing evidence to counter the Petitioners' contentions or demonstrating that their registration with the same status as their grandmother fails to fulfil the purpose of Regulation 12. Thus, the decision is unreasonable, injurious and destructive.

The Respondent's refusal to register the children betrays the child's best interest

73. In addition to the harm the decision to deny the application to have the children registered with the same status as their grandmother causes, it is also entirely at odds with the principle of the child's best interest. According to this principle, the child's best interest must be the primary consideration in any action that relates to children which is taken by courts, administrative authorities or legislative bodies. So long as the child is a minor, and so long as his or her parent or guardian functions properly, the child's best interest is to be raised by the family unit that supports him or her.

74. The principle of the child's best interest is a fundamental and well rooted principle in Israeli law. So, for instance, in CivA 2266/93 **A. v. B.** IsrSC 49(1) 221, Justice Shamgar ruled that the state must intervene in order to protect the child from a violation of his or her rights.

75. Furthermore, the principle of the child's best interest has been mentioned in judgments as a guiding principle whenever rights must be balanced against one another. As stated in CivA 549/75 **A. v. Attorney General**, IsrSC 30(1), 459, pp. 465-466, "there is no judicial matter pertaining to minors wherein the best interest of the minors is not the primary and central consideration".

76. The principle of the child's best interest is given primacy in international law as well. This is expressed, *inter alia*, in the introduction of the Convention on the Rights of the Child, which was ratified by Israel on August 4, 1991. The Convention stipulates several binding provisions for the protection of the child's family unit (see, Preamble, and Arts. 3(1) and 9(1) of the Convention). In particular, Art. 3 of the Convention stipulates children's interests must be a primary consideration in any governmental act. It follows that any act of legislation or policy must be interpreted in a manner that allows the protection of the minor's rights.

77. The Respondent's conduct in the matter of the children constitutes a severe violation of its duty as an administrative authority to consider the child's best interest. As aforesaid, the Respondent is aware how Petitioners 2-4 would be impacted should they not be registered with the same status as their grandmother and should they be left without any status anywhere in the world. Instead of sensitively and efficiently promoting the interests of the children, who were born in Israel to a permanent resident and have lived there all their lives, and registering them as required by the Regulation and the order with which it was presented, or, alternatively, performing a sincere examination of the best interest of the Petitioners herein, the Respondent refuses to grant the Petitioners status in Israel.

Conclusion

78. Therefore, the Court is moved to order the Respondent to immediately grant the application for the registration of the children as permanent residents in Israel under Regulation 12, based on the conclusive order issued by the Shari'a Court in the children's matter back in 2005. In addition, the Petitioners move the Honorable Court to issue a costs order against the Respondent for legal fees and trial costs, considering the Respondent's conduct, whereby instead of following the Regulation and procedures, and at least, independently reassess the children's best interest prior to issuing such a callous decision in their matter, acted otherwise, as described above.

Jerusalem June 11, 2014.

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(File No: 67677)